DATUK BANDAR KUALA LUMPUR

v.

ZAIN AZAHARI ZAINAL ABIDIN

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
SITI NORMA YAAKOB JCA
AHMAD FAIRUZ JCA
[CIVIL APPEAL NO: W-04-35-94]
17 FEBRUARY 1997

ADMINISTRATIVE LAW: *Exercise of administrative powers - Public authority - Town planning - Approval of development plan - Exercise of power or discretion - Whether to be exercised for a proper purpose - Whether to be exercised in accordance with law - Whether to give reasoned decision - Failure to give reasons - Whether fatal - Federal Territory (Planning) Act 1982, ss. 2, 22, 64 - Federal Territory (Planning) (Zoning & Density) Rules 1985, r. 2 - Planning & Development Rules 1970, r. 2(3)*

ADMINISTRATIVE LAW: *Exercise of administrative powers - Public authority - Exercise of power or discretion - Position of a public decision-maker - Whether akin to a trustee - Federal Territory (Planning) Act 1982, ss. 2, 22, 64 - Federal Territory (Planning) (Zoning & Density) Rules 1985, r. 2*

STATUTORY INTERPRETATION: *Federal Territory (Planning) Act 1982, s. 22 - Town planning - Approval of development plan - Power conferred upon the Datuk Bandar - Scope and extent*

The respondent and Tradium Sdn. Bhd. ('Tradium') were the respective owners of adjoining parcels of land in Kuala Lumpur. Tradium had wanted to develop its said land ('the subject property') and build thereon an apartment building, whereupon it applied to the appellant for and obtained a development order in respect of the proposed development ('the first development order'). The proposed development, if carried through, would increase the residential density of the locality from 11 persons per acre to 56 persons per acre. The respondent was unhappy with the density increase, and the fact that he was not notified of the proposed development, and so applied for and obtained a **certiorari** order quashing the first development order. This order notwithstanding, the appellant thereafter caused his subordinate officer ('Mokhtar') to conduct an inquiry into Tradium's original application, and, having considered the inquiry papers, decided

all the same to approve Tradium's application. The respondent thereupon once again moved the Court for **certiorari**, and following that, an order was again made by the Court quashing the appellant's decision. The appellant has since appealed.

The facts showed that the comprehensive planning and development of the City of Kuala Lumpur was comprised of three large plans known respectively as plans Nos. 1039, 1040 and 1041. It was also a fact that the subject property, as well as the respondent's land, were both situated in plan No. 1040, otherwise known as Metropolitan Kuala Lumpur. These apart, it was not in dispute that under the Federal Territory (Planning Act) 1982 ('the Act'), the appellant was given power to grant or refuse planning permission in respect of any development in Kuala Lumpur, as well as to make rules generally for the better carrying out of the provisions of the Act. The evidence also showed that in 1985, pursuant to his rule-making power aforesaid, the appellant had caused to be published in the Gazette the Federal Territory (Planning) (Zoning and Density) Rules 1985 ('the Rules'), whereby all lands within the Federal Territory of Kuala Lumpur, except for lands located in plans Nos. 1040 and 1041, were zoned as residential and accorded a density of 60 persons per acre.

The learned Judge, in quashing the appellant's decision, ruled that since the appellant had resorted to his rule making power under the Act when increasing the density of the area covered by the Rules in 1985, the respondent, therefore, had a legitimate expectation that the appellant would resort to same when considering Tradium's application. It was thus held that, before granting the impugned approval, the appellant must first make a rule increasing the density of the locality of the subject property, and since this was not done, the purported increase could only be an invalid exercise.

Before the learned appellate Judges, the appellant contended that the approach as adopted by the learned Judge showed a misapprehension of the facts and the applicable law, as Parliament could not have intended that the appellant must resort to s. 64 of the Act, and proceed to make rules every time an application is made by a land owner. The respondent retorted that it was obligatory of the appellant in the circumstances to have affirmed an affidavit, and set out the matters that he took into account when granting the approval. The absence of such an affidavit, the respondent argued, could only mean that the appellant had not exercised the discretion given him in accordance with law, and the appeal must therefore fail on this ground. It was further argued that in this respect, an affidavit by Mokhtar is insufficient and is no substitute for the appellant's own affirmation.

Held:

Per Gopal Sri Ram JCA:

[1] The instant appeal falls to be decided according to the provisions of the Federal Territory (Planning) Act 1982, as well as the Rules made thereunder, including the Planning and Development Rules 1970 which remain in force until the present day.

[1a] If the appellant must formulate and publish in the *Gazette* a formal Rule in respect of each planning permission involving an increase in residential density, the development of the city of Kuala Lumpur would, for all practical purposes, come to a standstill. We do not glean such a result would have been intended by Parliament when it passed the Act. The learned Judge had thus erred in quashing the planning approval on the ground relied upon by him.

[2] A public decision-maker like the appellant, upon whom a power or discretion is vested by Parliament, is akin to a trustee. He is under an obligation to exercise it reasonably and in accordance with the terms of the relevant statute that confers the power or discretion. Also, when his exercise of the discretion is questioned it is incumbent upon him to meet the challenge by adducing relevant and admissible evidence.

[3] As a general rule, where an applicant files an affidavit alleging that a particular decision was not arrived at in accordance with law, it is incumbent upon the particular decision-maker to affirm and file an affidavit rebutting the allegation and setting out those matters which led him to make the impugned decision. Subject to cases where good reasons were shown for the affidavit's absence, and cases where such an affidavit is unnecessary, this general rule will apply in full force where such an affidavit is absent and no cogent reasons are proferred by way of admissible evidence to explain the absence.

[3a] The affidavit, in order to amount to a satisfactory rebuttal, must be affirmed by the person who has personal knowledge of the facts in issue. An affidavit by a deponent who has no personal knowledge of the consideration upon which the decision was based is pure hearsay and is worthless as evidence.

[3b] Where allegations on affidavit are unrebutted by the party against whom they are made, a Court is entitled to conclude that those allegations have been accepted.

[4] There is no doubt that s. 22 of the Act by its terms confers a discretion upon the appellant in matters of planning approval. It is however not an unfettered discretion as the section also imposes restrictions on the exercise of such discretion. In particular, it requires the appellant to take into account the several matters set out therein when arriving at a decision. It also recognises the importance of a reasoned decision by requiring the appellant, in sub-s. (5), to state his reasons when refusing an application for planning permission or when granting conditional approval.

[5] Since it is for the appellant to make the determination on issues of planning approval, it is for him, when challenged, to set out the matters he took into account when arriving at his decision so as to satisfy the Court that he acted in accordance with law. This he must do, in the ordinary way, by filing an affidavit explaining the circumstances that affected his decision. On the authorities, he cannot be compelled to provide an affidavit, but if he does not do so, the usual consequences must follow and the Court must be left to decide the case on such admissible evidence as is made available to it.

[6] The appellant in the instant case has not filed any affidavit. Nor has any, or any sufficient, reason been advanced by him to justify this failure. There is also no valid reason not to place the facts before the learned Judge. There is further no suggestion that questions of national security or public interest immunity are involved.

[6a] Consequently, all that the learned Judge had before him was an affidavit deposed to by Mokhtar bin Long Idris, the officer who conducted the inquiry prior to the grant of planning approval. Although Mokhtar's affidavit set out the reasons for granting planning approval to Tradium, it was the appellant's case that the decision to grant Tradium planning approval was made none other than the appellant himself. In these circumstances, all that Mokhtar bin Long Idris said about the matter was pure hearsay.

[7] There is absolutely no admissible evidence here as to whether the discretion was exercised in accordance with law. This being the case, the respondent must be held to have established his case.

[8] This is a case where the appellant has established that the learned Judge was wrong in his reasons for issuing **certiorari**. The respondent therefore succeeded before the learned Judge for the wrong reason. Before this Court, he succeeds on other grounds. Taking these into

account and all other circumstances, this is a proper case in which there should be no order as to costs, here as well as in the Court below.

[Appeal dismissed. Order accordingly.]

*[**Bahasa Malaysia** Translation of Headnotes]*

UNDANG-UNDANG PENTADBIRAN: *Pihak berkuasa awam - Perancangan bandar - Kelulusan pelan pembangunan - Pelaksanaan kuasa atau budibicara - Samada untuk dilaksanakan bagi tujuan yang wajar - Samada hendaklah dilaksanakan menurut undang-undang - Samada haruslah memberikan keputusan yang beralasan - Kegagalan untuk memberikan alasan-alasan - Sama ada memudaratkan - Akta Wilayah Persekutuan (Perancangan), 1982 ss. 2, 22, 64 - Kaedah-kaedah (Perancangan) (Ketumpatan dan Pengezonan) Wilayah Persekutuan 1958 k. 2 - Kaedah-kaedah Perancangan & Pembangunan 1970 k. 2(3)*

UNDANG-UNDANG PENTADBIRAN: *Pihak berkuasa awam - Perlaksanaan kuasa atau budibicara - Kedudukan pembuat keputusan awam - Samada serupa dengan pemegang amanah - Akta (Perancangan) Wilayah Persekutuan 1982 ss.2, 22, 64 - Kaedah-kaedah (Perancangan)(Ketumpatan & Pengezonan) Wilayah Persekutuan, 1985 k. 2*

TAFSIRAN: *Seksyen 22 Akta (Perancangan) Wilayah Persekutuan 1982 - Perancangan bandar - Kelulusan pelan pembangunan - Kuasa yang diberikan kepada Datuk Bandar - Skop dan had*

Responden dan Tradium Sdn Bhd. (Tradium) adalah tuanpunya kepada bidang-bidang tanah yang bersebelahan di Kuala Lumpur. Tradium hendak membangunkan tanahnya ('hartanah yang diperihalkan') dan membina di atasnya sebuah bangunan pangsapuri, lalu memohon kepada perayu untuk dan memperolehi satu perintah pembangunan berhubung pembangunan yang dicadangkan itu (perintah pembangunan pertama). Pembangunan yang dicadangkan itu, jika dilaksanakan, akan meningkatkan ketumpatan kediaman di kawasan tersebut daripada 11 orang se ekar kepada 56 orang se ekar. Responden tidak berasa senang dengan peningkatan ketumpatan ini, dan dengan hakikat bahawa beliau telah tidak dimaklumkan mengenai pembangunan yang dicadangkan itu, dan dengan itu telah memohon bagi mendapatkan serta telah mendapatkan satu perintah *certiorari* yang membatalkan perintah pembangunan yang pertama. Meskipun adanya perintah ini, perayu selepas itu telah menyebabkan pegawai bawahannya ('Mokhtar') untuk melakukan satu siasatan ke atas permohonan asal Tradium, dan, setelah menimbangkan kertas-kertas

siasatan, masih juga memutuskan untuk meluluskan permohonan Tradium. Responden selepas itu sekali lagi mengusul Mahkamah untuk *certiorari*, dan berikutan itu, satu perintah sekali lagi dibuat oleh Mahkamah bagi membatalkan keputusan perayu. Perayu telah sejak itu merayu.

Fakta-fakta menunjukkan bahawa perancangan dan pembangunan yang komprehensif bagi Bandaraya Kuala Lumpur terdiri daripada tiga perancangan yang besar yang dikenali masing-masingnya sebagai pelan No. 1039, 1040 dan 1041. Ianya juga suatu fakta bahawa hartanah yang diperihalkan, dan juga tanah responden, kedua-duanya terletak dalam pelan No. 1040, yang sebaliknya dikenali sebagai Metropolitan Kuala Lumpur. Selain itu, ianya tidak dipertikaikan bahawa di bawah Akta (Perancangan) Wilayah Persekutuan, 1982 (Akta), perayu telah diberikan kuasa untuk memberikan atau menolak kebenaran perancangan berhubung dengan apa-apa pembangunan di Kuala Lumpur, dan juga untuk membuat kaedah-kaedah secara amnya untuk melaksanakan dengan lebih baik lagi peruntukan-peruntukan Akta. Keterangan tersebut juga menunjukkan bahawa dalam tahun 1985, selaras dengan kuasa membuat kaedah beliau yang tersebut di atas, perayu telah menyebabkan penerbitan dalam Warta, Kaedah-kaedah (Perancangan) (Ketumpatan dan Pengezonan) Wilayah Persekutuan 1985 ('Kaedah-kaedah') di mana kesemua tanah dalam Wilayah Persekutuan Kuala Lumpur, kecuali tanah-tanah yang terletak dalam pelan No. 1040 dan 1041, telah dizonkan sebagai zon kediaman dan diberikan ketumpatan seramai 60 orang bagi satu ekar.

Hakim yang bijaksana, dalam membatalkan keputusan perayu, memutuskan bahawa oleh kerana perayu telah merujuk kepada kuasa membuat kaedah nya di bawah Akta tersebut ketika meningkatkan ketumpatan kawasan yang terlingkung oleh Kaedah-kaedah dalam tahun 1958, responden, dengan itu, mempunyai harapan yang sah bahawa perayu akan merujuk kepada perkara yang sama ketika menimbangkan permohonan Tradium. Dengan itu telah diputuskan bahawa, sebelum memberikan kelulusan yang dipersoalkan, perayu mestilah pertama-tamanya membuat satu kaedah bagi meningkatkan ketumpatan kawasan hartanah yang diperihalkan, dan oleh kerana perkara ini telah tidak dilakukan, peningkatan yang dilaksanakan itu adalah suatu pelaksanaan yang tak sah.

Di hadapan Hakim-hakim rayuan yang bijaksana, perayu menegaskan bahawa pendekatan sepertimana yang diterima pakai oleh Hakim yang Bijaksama menunjukkan kesilapan fakta dan undang-undang yang terpakai, kerana Parlimen tidak mungkin telah berniat bahawa perayu mestilah merujuk kepada s. 64 Akta, dan terus membuat kaedah-kaedah setiap kali permohonan di buat oleh seorang tuanpunya tanah. Responden menempelak bahawa ianya wajib bagi perayu dalam keadaan di sini untuk mengikrarkan satu afidavit, dan membentangkan

perkara-perkara yang beliau telah mengambilkira ketika memberikan kelulusan itu. Ketiadaan afidavit yang sedemikian, dihujahkan oleh responden, bermakna bahawa perayu telah tidak melaksanakan budibicara yang diberikan kepadanya menurut undang-undang, dan rayuan itu mestilah dengan itu gagal atas alasan ini. Selanjutnya dihujahkan bahawa sehubungan dengan perkara ini, afidavit oleh Mokhtar adalah tidak mencukupi dan tidak boleh menggantikan pengikraran yang dibuat oleh perayu sendiri.

Diputuskan:
Oleh Gopal Sri Ram HMR:

[1] Rayuan semasa ini mestilah diputuskan menurut peruntukan-peruntukan Akta Wilayah Persekutuan (Perancangan) 1982, dan juga Kaedah-kaedah yang dibuat di bawahnya, termasuk Kaedah-kaedah Perancangan dan Pembangunan 1970 yang mana kekal berkuatkuasa sehingga kini.

[1a] Jika perayu mesti merumuskan dan menerbitkan dalam Warta satu Kaedah rasmi berhubung dengan setiap keizinan perancangan yang melibatkan peningkatan dalam ketumpatan penduduk, pembangunan bandaraya Kuala Lumpur akan secara praktiknya menjadi terhenti. Kami tidak boleh merumuskan bahawa keputusan yang sedemikian telah diniatkan oleh Parlimen ketika ianya meluluskan Akta. Hakim yang bijaksana dengan itu telah tersalah dalam membatalkan kelulusan perancangan itu atas alasan yang beliau berikan.

[2] Pembuat keputusan awam seperti perayu, ke atas siapa sesuatu kuasa atau budibicara diletakkan oleh Parlimen, adalah sama seperti seorang pemegang amanah. Beliau wajib melaksanakannya dengan sewajarnya dan menurut terma-terma statut relevan yang memberikan kuasa atau budibicara itu. Dan juga, apabila perlaksanaan olehnya akan budibicara itu dipersoalkan, ianya adalah wajib bagi beliau menjawab cabaran dengan mengemukakan keterangan yang relevan dan boleh diterima.

[3] Sebagai satu kaedah awam, di mana seseorang pemohon memfailkan satu afidavit mendakwa bahawa sesuatu keputusan tertentu tidak dicapai menurut kehendak undang-undang, ianya wajib bagi pembuat keputusan itu untuk mengikrarkan serta memfailkan satu afidavit bagi mematahkan pengataan atau dakwaan itu dan membentangkan perkara-perkara yang telah menyebabkan beliau membuat keputusan yang dipersoalkan itu. Tertakluk kepada kes-kes di mana alasan-alasan yang baik ditunjukkan kerana ketiadaan afidavit, dan kes-kes di mana

afidavit yang sedemikian adalah tidak perlu, kaedah am ini akan terpakai sepenuhnya di mana afidavit yang sedemikian tidak dikemukakan dan tiada alasan kuat diberi melalui keterangan yang boleh diterima bagi menerangkan ketiadaan itu.

[3a] Bagi membawa kepada suatu pematahan yang memuaskan, afidavit tersebut mestilah diikrarkan oleh orang yang mempunyai pengetahuan secara peribadi akan fakta-fakta yang dipertikaikan. Sesuatu afidavit oleh deponen yang tidak mempunyai pengetahuan secara peribadi akan sebab-sebab di atas mana keputusan itu telah disandarkan adalah keterangan dengar cakap dan samasekali tidak berguna sebagai keterangan.

[3b] Di mana pengataan-pengataan atas afidavit tidak dapat dipatahkan oleh pihak terhadap siapa ianya dibuat, sesebuah Mahkamah adalah berhak untuk memutuskan bahawa pengataan-pengataan itu telah diterima.

[4] Tidak dapat diragukan lagi bahawa s. 22 Akta menurut terma-termanya memberikan suatu budibicara ke atas perayu berhubung dengan perkara-perkara berkaitan dengan kelulusan pelan. Ianya namun begitu bukannya merupakan satu budibicara yang tidak terhalang kerana seksyen tersebut juga mengenakan sekatan ke atas perlaksanaan bubibicara yang sedemikian. Khususnya, ianya menghendaki perayu mengambilkira beberapa perkara yang dibentangkan di dalamnya ketika mencapai keputusan. Ianya juga mengiktiraf kepentingan keputusan yang mempunyai alasan dengan menghendaki perayu, dalam sek. kecil (5), untuk menyatakan alasannya ketika menolak sesuatu permohonan untuk kebenaran perancangan atau ketika memberikan kelulusan bersyarat.

[5] Oleh kerana ianya terpulang kepada perayu untuk membuat penentuan mengenai isu-isu kelulusan perancangan, ianya adalah terletak padanya, apabila dicabar, untuk membentangkan perkara-perkara yang telah beliau ambilkira ketika mencapai keputusannya bagi memuaskan Mahkamah bahawa beliau telah bertindak menurut undang-undang. Perkara ini harus beliau lakukan menurut cara biasa, dengan memfailkan satu afidavit yang menerangkan keadaan-keadaan yang mempengaruhi keputusannya. Berdasarkan autoriti-autoriti, beliau tidak boleh dipaksa untuk memberikan satu afidavit, tetapi jika beliau tidak melakukan sedemikian, akibat-akibat yang biasa mestilah menyusuli dan Mahkamah mestilah dibiarkan untuk memutuskan kes itu berdasarkan keterangan boleh terima sebagaimana yang disediakan baginya.

[6] Perayu dalam kes semasa telah tidak memfailkan sebarang afidavit. Tidak juga terdapat apa-apa atau sebarang alasan yang mencukupi yang

telah dikemukakan oleh beliau bagi mewajarkan kegagalan ini. Tidak juga terdapat alasan-alasan yang sah untuk tidak mengemukakan fakta-fakta di hadapan Hakim yang bijaksana. Selanjutnya tidak terdapat saranan bahawa wujud persoalan-persoalan keselamatan negara atau imuniti kepentingan awam.

[6a] Akibatnya, apa yang terdapat di hadapan Hakim adalah afidavit yang telah dideposkan oleh Mokhtar bin Long Idris, pegawai yang mengendalikan siasatan sebelum pemberian kelulusan perancangan. Walaupun afidavit Mokhtar membentangkan alasan-alasan bagi memberikan kelulusan perancangan kepada Tradium, ianya merupakan kes perayu bahawa keputusan untuk memberikan kepada Tradium kelulusan perancangan telah dibuat tidak lain oleh perayu sendiri. Dalam keadaan ini, apa yang telah dikatakan oleh Mokhtar bin Long Idris mengenai perkara ini adalah dengar cakap semata-mata.

[7] Secara mutlaknya tidak terdapat keterangan yang boleh diterima berhubung dengan sama ada budibicara tersebut telah dilaksanakan menurut undang-undang. Oleh kerana keadaannya sedemikian, responden mesti diputuskan sebagai telah membuktikan kesnya.

[8] Ini merupakan kes di mana perayu telah menunjukkan bahawa Hakim yang bijaksana adalah salah dalam alasan-alasannya untuk mengeluarkan *certiorari.* Responden dengan itu berjaya di hadapan Hakim yang bijaksana atas alasan-alasan yang salah. Di hadapan Mahkamah ini, beliau telah berjaya atas alasan-alasan yang lain. Mengambilkira perkara-perkara ini dan kesemua keadaan-keadaan yang lain, ini merupakan suatu kes yang wajar dalam mana tidak seharusnya terdapat perintah bagi kos, di sini dan juga di Mahkamah di bawah.

[Rayuan ditolak. Perintah sekadarnya.]

Cases referred to:

Rohana bte Ariffin v. University Sains Malaysia [1989] 1 MLJ 487 ***(refd)***

Thomas v. Marconi's Wireless Telegraph Co. Ltd. [1965] 1 WLR 850 ***(refd)***

Ho Kean v. Kong Lai Soo [1974] 2 MLJ 63 ***(refd)***

Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn. Bhd. [1979] 1 MLJ 135 ***(foll)***

R. Rama Chandran v. The Industrial Court of Malaysia & Anor. [1997] 1 CLJ 147 ***(foll)***

Majlis Perbandaran Seberang Perai v. Tropiland Selangor Bhd. Bhd. [1996] 3 CLJ 837 ***(foll)***

Kumpulan Perangsang Selangor Bhd. v. Zaid bin Haji Mohd Noh [1997] 2 CLJ 11 ***(foll)***

Minister of Labour, Malaysia v. Sanjiv Oberoi [1990] 1 CLJ 44 ***(refd)***

R. v. Lewes Justices, ex parte Home Secretary [1973] AC 388 ***(refd)***

New Zealand Fishing Industry Association Inc. v. Minister of Agriculture and Fisheries [1988] 1 NZLR 544 ***(refd)***
R. v. Barnsley Metropolitan Borough Council, ex parte Hook [1976] 1 WLR 1052 ***(refd)***
Madhya Pradesh Industries Ltd. v. The Income Tax Officer, Nagpur AIR [1970] SC 1015 ***(refd)***
Narayanappa v.Commissioner of Income Tax, Bangalore AIR [1967] SC 523 ***(cit)***
Kantamani Venkata Narayana & Sons v. First Additional Income Tax Officer, Rajahmundry AIR [1967] SC 587 ***(cit)***

Legislation referred to:
City of Kuala Lumpur Act (Planning) 1973, ss. 6, 64(1)
Emergency (Essential Powers) Ordinance 1970, s. 4
Federal Territory (Planning) Act 1982, ss. 2, 22, 64, 64(1), 65(2)(a)
Federal Territory (Planning) (Zoning & Density) Rules 1985, r. 2
Planning & Development Rules 1970, r. 2(3)
Town Boards Enactment, FMS Cap. 137, Part IX

[Appeal from High Court Malaya, Kuala Lumpur; Originating Motion No: K1-25-118-92]

For the appellant - Dato' Zaki Tun Azmi (Vishu Kumar with him); M/s. Rashid & Lee
For the respondent - Haji Sulaiman Abdullah (Anita Sockalingam with him); M/s. Zain & Co.

JUDGMENT

Gopal Sri Ram JCA:

The Datuk Bandar of Kuala Lumpur has appealed to this Court to reverse an order of **certiorari** issued by the High Court quashing a building approval given by him. We heard oral argument in the appeal on 26 November 1996 after which we granted Counsel leave to supplement their submissions by putting in a written note. We then reserved judgment. Counsel having filed their written submissions, we are now in a position to pronounce our decision and provide reasons for it.

The matters relevant to the appeal arose in this way.

Jalan U Thant is quite a prestigious part of the city. It is mainly residential. Many foreign missions have their offices in the vicinity. The official residences of several Ambassadors and High Commissioners are also located along Jalan U Thant and the neigbouring road, Jalan Langgak Golf. All this is common knowledge.

The respondent is the registered proprietor of a piece of land along Jalan U Thant. There is a dwelling house on the respondent's land. It is a bungalow.

The respondent and his family reside there.

A company called Tradium Sdn. Bhd. ('Tradium') also owns property in the same area. It is located along Jalan Langgak Golf. But it is adjacent to the respondent's property and shares a common boundary with the respondent's land. For convenience, we will refer to it as 'the subject property.' At some point in time there was also a bungalow on the subject property.

Tradium wanted to develop the subject property by demolishing the bungalow and constructing a three storeyed apartment building. The development involved an increase in the population density ratio. To do all this, Tradium required approval from the appellant. It submitted its plans.

On 4 October 1990, the appellant approved the development proposed by Tradium and issued an order ('the first development order'). In the result, there was an increase in residential density of the locality from 11 persons per acre to 56 persons per acre.

The respondent was not notified of Tradium's proposed development before the first development order was issued. He was given no opportunity to object to it although he had a right to do so. There had been procedural unfairness. This is a concept of wider import than the expression 'natural justice.' It has its roots in the Federal Constitution. It was first introduced into our jurisprudence by the classic judgment of Edgar Joseph Jr. J (as he then was) in *Rohana bte Ariffin v. University Sains Malaysia* [1989] 1 MLJ 487. That decision has had an extremely beneficial impact upon, and has forever changed, the approach of our Courts to administrative law in this country.

The respondent came to know about the first development order. He applied to have it quashed. He succeeded. The same Judge who heard the present case also heard the earlier application. But he did not remit the matter to the appellant for re-consideration. There has been some argument about it before us on the effect of this omission. We think that it may be conveniently dealt with at this juncture.

Counsel for the respondent informed us that the appellant had made an application to have the matter remitted but that the Judge had refused it. He says that the refusal has serious consequences. The development order was valid for only a year. It lapsed after that. Since the Judge had not remitted the original application back to the appellant for re-consideration, there was nothing for the appellant to re-consider. Tradium had therefore to make a fresh application. It did not. So, there was nothing before the appellant on which he could make a decision.

The respondent took this point in the Court below. But the Judge thought there was nothing in it. He said so in his judgment.

Dato' Zaki Tun Azmi, who also appeared for the appellant in the earlier proceedings told us quite frankly that he has no recollection of having made such an application. He has, however, argued that the Judge was correct in rejecting the respondent's argument.

Is it open for the respondent to argue this point before us? We think it is.

Although a point is decided in an appellant's favour in the Court of first instance, it is certainly open to a respondent to take it before this Court and argue that the learned Judge's judgment should be upheld for other reasons. But two conditions must be met.

First, a respondent should give adequate notice to an appellant of his intention to raise the argument. Second, the point must be a live one, in the sense that it was raised in the Court below and was not at any stage abandoned. The law on the point was settled by the decision of the English Court of Appeal in *Thomas v. Marconi's Wireless Telegraph Co. Ltd.* [1965] 1 WLR 850 which was applied by the former Federal Court in *Ho Kean v. Kong Lai Soo* [1974] 2 MLJ 63.

In the present case, both conditions have been met. Adequate notice has been given and the point remains alive to be canvassed. However, for reasons that will become apparent later, we find it unnecessary to deal with the argument. By this, we are not to be taken to say that it has, or lacks, merit. It is just that the route we propose to take renders the point academic for present purposes.

With that we now return to the factual background.

After the first development order had been quashed, the appellant caused an inquiry to be conducted into Tradium's original application for development. The appellant properly delegated the power to conduct the inquiry to one of his subordinate officers. The respondent was given notice of the inquiry. He was away from the country and so did not attend in person. But his solicitor did, and asked for a postponement. The officer conducting the inquiry declined to grant it. We are satisfied, having read the notes of the inquiry kept by the respondent's legal advisers, that no prejudice whatsoever was occasioned to the respondent by the inquiring officer's refusal to grant a postponement. The attending solicitor more than adequately prepared to make all objections to the

grant of planning permission. Having examined the material made available to us in the record of appeal, we are satisfied that procedural fairness, in all respects was meted out and that no complaint may be validly made about the conduct of the inquiry.

After completing the inquiry, the officer concerned sent all the papers to the appellant to make a decision. That is because the appellant had reserved unto himself the power to make the ultimate decision whether or not to grant planning permission to Tradium.

The appellant decided to approve Tradium's application. In due course he made known his decision. The respondent was dissatisfied with the decision. He once again moved the High Court for **certiorari**. He advanced several grounds in support of his application. All but one found no favour with the learned Judge. We must now consider the sole ground upon which the Judge quashed the appellant's decision. It has been vigourously attacked before us.

Dato Zaki has said that in order to understand the point in issue we must hearken to some of the background and the relevant legislative history. We agree with him. He has carefully taken us through these. We are grateful to him for his assistance.

The comprehensive planning and development of the City of Kuala Lumpur is comprised in three large plans. They are numbered 1039, 1040 and 1041 respectively. We are only concerned with two of them. They are plans 1040 and 1041.

Plan No. 1040 is for all the land that comes within what may be conveniently described as 'Metropolitan Kuala Lumpur'. It covers an area of some 36 square miles. Plan 1041 is in respect of a wider area of the City that does not include those lands falling within Plan No. 1040 and which may, for convenience be termed as 'Greater Kuala Lumpur'. The subject property is located within Metropolitan Kuala Lumpur and, for that reason, falls within plan No. 1040.

All three plans find mention in the legislation that was passed or promulgated from time to time for the purpose of regulating the planning and development of the City. As we perceive it, there are four stages in the relevant legislative history.

The first stage covers the period before 1970. At that point in time, Kuala Lumpur was the capital of the State of Selangor as well as the Federation. It was then a municipality administered by a Commissioner. All aspects of its planning were regulated by Part IX of the Town Boards Enactment, FMS Cap.

137 ('the Enactment'). Further, the planning and development of Kuala Lumpur appeared in three plans numbered L886, L887 and L888 which were prepared and published in 1967.

The second stage covers the period between 1970 and 1973. In 1970, the Emergency (Essential Powers) Ordinance (No. 46 of 1970) ('the Ordinance') was promulgated. It repealed Part IX of the Enactment. The development of Kuala Lumpur was, by the terms of the ordinance, to be governed by a comprehensive development plan. Section 4 of the Ordinance described that plan as follows:

> 4 (1) The plans which were gazetted under the *Gazette* Notification No. 1197/67 as Plan Nos. L886, L887 and L888 which have been approved with modifications by the Minister and renumbered as Plan Nos. 1039, 1040 and 1041 respectively shall be deemed to be the comprehensive development plan under this Ordinance.
>
> (2) The comprehensive development plan referred to under sub-s. (1) shall be exhibited for public inspection by the Authority at the office of the Commissioner for a period of not less than three months from the coming into force of this Ordinance.

We would add, for completeness, that pursuant to the power conferred by the Ordinance, subsidiary legislation called the "Planning and Development Rules" were made and came into force on 1 October 1970. For reasons that will soon become apparent, the Planning and Development Rules 1970 ('the 1970 Rules') remain in force. The 1970 Rules regulate applications for planning permission and provide forms which are to be used in connection with such applications.

In 1972, Kuala Lumpur attained city status. It ceased to be the capital of Selangor. It became a Federal Territory. Eventually, the Commissioner was replaced by the office of the appellant. The original boundary of the City which had earlier circumscribed the inner City was extended to include Greater Kuala Lumpur.

The third stage covers the period between 1973 and 1982. In 1973, Parliament passed the City of Kuala Lumpur (Planning) Act ('the 1973 Act') by which the Ordinance was, for constitutional reasons, repealed and re-enacted.

Section 6 of the 1973 Act reads as follows:

> 6. (1) The Plan Nos. L886, L887 and L888 gazetted under *Gazette* Notification No. 1197 of 1967 as modified and renumbered by the Minister as plan Nos. 1039, 1040 and 1041 respectively and exhibited in accordance with

the provision of s. 4(2) of the Emergency (Essential Powers) Ordinance No. 46 of 1970 shall be the comprehensive development plan for purposes of this Act.

(2) On the date this Act comes into force or as soon as possible thereafter, a public notice shall be published in the *Gazette* to inform the public of the place or places where copies of the Plan Nos. 1039, 1040 and 1041 referred to in sub-s. (1) may be inspected or where copies may be purchased on payment of the prescribed fees.

The 1973 Act contained a saving provision under which the Planning and Development Rules were extant.

The fourth and final stage covers the period 1982 until the present day. Parliament passed the Federal Territory (Planning) Act 1982 ('the Act') which repealed and replaced the 1973 Act. There is a saving provision in the Act. It is s. 65(2), of which only para. (a) is relevant to this case. It reads:

(2) Notwithstanding the repeal of the law specified in sub-s. (1), which in this Act is referred to as the 'repealed law' -

(a) any rule made under the repealed law shall in so far as it is not inconsistent with the provisions of this Act continue in force and have the like effect as if it had been made under this Act.

By reason of this provision read with the equipollent section in the 1973 Act, the Planning and Development Rules 1970 remain in force until the present day.

Before proceeding any further, we note that the instant appeal falls to be decided according to the provisions of the Act and not under any of its precursors.

The Act refers to the "Comprehensive Development Plan" which it defines in s. 2 as follows:

'Comprehensive Development Plan' means the comprehensive development plan referred to as plans Nos.: 1039, 1040 and 1041 in the City of Kuala Lumpur (Planning) Act 1973

There is another definition in the Act which is relevant to the present appeal. It is the expression "development plan" which the Act defines as follows:

'Development plan', in relation to an area means -

(a) the local plan for the area; or

(b) if there is no local plan for the area, the structure plan for the area;

and, in relation to any land or building, means the development plan, as so defined, for the area in which the land or building is situated.

The Act also contains a provision that confers power to make subsidiary legislation. It is s. 64(1) of the Act, the relevant provisions of which read as follows:

64. (1) The Commissioner may with the approval of the Minister make rules generally for the better carrying out of the provisions of this Act.

(2) In particular and without prejudice to the generality of the foregoing powers such rules may provide for all or any of the following matters, namely -

(a) regulating the development of land in relation to proper planning;

(b) the classes of use of land and buildings or parts thereof;

(c) the control of residential density, floor area, plot ratio, plinth area, and uses of buildings.

On 30 October 1985, the appellant caused to be published in the *Gazette vide* P.U.(A) 501 certain rules which had received the Minister's approval on 31 October 1985. In the main, they read as follows:

Federal Territory (Planning) Act 1982 Federal Territory (Planning) (Zoning And Density) Rules 1985

In exercise of the powers conferred by s. 64 of the Federal Territory (Planning) Act 1982, the Commissioner of the City of Kuala Lumpur, with the approval of the Minister, makes the following rules:

1. These Rules may be cited as the Federal Territory (Planning) (Zoning and Density) Rules 1985.

2. All lands within the Federal Territory of Kuala Lumpur excluding lands located in plans Nos. 1040 and 1041 are hereby zoned as residential with a density of 60 persons per 0.4 hectare.

For convenience, we shall refer to the foregoing publication as 'the Rules'. We pause to make the following two observations in relation to the subject matter dealt with by the Rules.

First it is common ground between the parties that in 1970 the population density ratio for Metropolitan Kuala Lumpur was fixed at 10 persons per acre. It follows that this density ratio was applicable to all lands that came within plan No. 1040. It appears that the same ratio also existed for lands that fell outside the scope of plan Nos. 1040 and 1041.

The Rules merely increased the population density ratio from 10 persons per acre to 60 persons an acre (0.4 hectare being the equivalent of one acre) over the relevant area. This overall increase is to be distinguished from any increase in the population density ratio occasioned by the development of a particular piece of land in a given area. That is a matter which falls to be dealt differently. And this brings us to our second observation.

Section 22 of the Act - which we will deal with at length later in this judgment - confers upon the appellant the power to grant or refuse planning permission in respect of any development. Planning permission may be granted conditionally or unconditionally. The 1970 Rules which regulate the procedure for making applications for planning permission contain a r. 2(3) which reads:

> (3) Applications to the authority for an increase in residential density shall be made in Form 3 of the First Schedule.

When s. 22 of the Act is read together with r. 2(3) - and we think this is how they should be read - it is implicit that the appellant is authorised to grant planning permission involving an increase in residential density in the locality of the proposed development without resorting to any further formality.

So much for the background.

We now turn to address the sole ground upon which the learned Judge decided the case for the respondent. In his written judgment, the learned Judge reproduced the Rules and s. 64 of the Act. He then went on to say as follows:

> It is to be noted that before such change can be effected it needed the approval of the Minister. It was some process and some formality as the Gazette No. P.U.(A) 501 of 1982 clearly show.
>
> By his approving and issuing a development order over this subject land when the residential density had not been properly changed from 10 persons per acre to the present change; without him having gone through the process, the Datuk Bandar had clearly infringed the existing status, as to the current residential density of the subject land concerned. I am of the view without having effected that change at the time of the approval of the development order, the Datuk Bandar was clearly acting in excess of his jurisdiction and acting to the detriment of the rights of the adjoining owner of the land who has a legitimate expectation that the residential density of his lot and that of his neighboring land would not be changed without the Datuk Bandar having resorted to the provisions of the Rules before a change can be done and the applicant is entitled to expect that the process of change would be faithfully followed by the Datuk Bandar.
>
> By reason of the Datuk Bandar's failure to have the residential density for the subject lot changed at the time of the approval of the development order bringing in its train such change I find the applicant had succeeded in his application in

terms prayed for and I hereby grant an order in terms and quash the decision of the Datuk Bandar granting the development order dated 22 September 1992 with costs to be taxed.

Without loss of content, the learned Judge's finding may be summarised thus. The appellant resorted to his rule making power conferred upon him by the Act when he increased the density of the area covered by the Rules. The respondent had a legitimate expectation that the same method would be followed when Tradium's application for planning approval came up for consideration. The appellant was therefore obliged to make a rule increasing the density of the locality in which the subject property is situated. Since he did not do so, the increase in residential density is invalid.

Dato' Zaki criticised the approach adopted by the learned Judge. He submitted that if the appellant has to resort to the provisions of s. 64 on every occasion an application for planning permission is made by a landowner, all development within Metropolitan and Greater Kuala Lumpur would come to a halt. He says that the learned Judge's conclusion is based upon a misappreciation of the facts and the applicable law. With these submissions, we are in agreement.

A distinction must be drawn between cases where the residential density is increased over an area covered by one or more of plans Nos. 1039, 1040 and 1041 and cases where an increase in residential density occasioned by the development by a landowner of his property. The presence of r. 2(3) negates any suggestion of a legitimate expectation on the part of the respondent found by the learned Judge to exist. As pointed out by the appellant's Counsel, if the appellant must formulate and publish in the *Gazette* a formal rule in respect of each planning permission involving an increase in residential density, the development of the City of Kuala Lumpur would, for all practical purposes, come to a standstill. With respect to the learned Judge, we do not glean such a result to have been intended by Parliament when it passed the Act. In our judgment, the learned Judge erred in quashing the planning approval in this case upon the ground relied upon by him.

But that is not the end of the matter. Haji Sulaiman of Counsel for the respondent has, as we had pointed out very early in this judgment, sought to defend the conclusion of the learned Judge upon other grounds advanced before him. We have already referred to one such ground which we have refrained from dealing with. We now propose to address ourselves to one of the other arguments advanced on the respondent's behalf.

It was submitted on the respondent's behalf that the appellant ought to fail in this appeal because the discretion conferred upon him was not exercised in accordance with law. Haji Sulaiman drew our attention to the absence of an

affidavit from the appellant setting out the matters that he took into account when granting Tradium planning approval for its development. He said that there was no admissible evidence before the learned Judge to explain the absence of such an affidavit. Neither was there any admissible evidence to demonstrate the matters that were taken into account by the appellant when he took his decision.

Dato' Zaki's response to these arguments is as follows.

It is for the appellant and not the Court to determine the planning of Kuala Lumpur, since it is the appellant who is best fitted to carry out that task. In any event, the decision to grant planning approval is not unreasonable when one considers all the circumstances of the case. Nothing therefore turns upon the absence of an affidavit from the appellant.

These are important arguments. In order to deal with them, it is necessary, as a first step, to examine the relevant statutory provision that is relied upon by both parties in support of their arguments. That provision is s. 22 of the Act which reads as follows:

> 22. (1) The Commissioner shall have power exercisable at his discretion to grant planning permission or to refuse to grant planning permission in respect of any development irrespective of whether or not such development is in conformity with the development plan; provided however the exercise of the discretion by the Commissioner under this sub-section shall be subject to the provisions of sub-s. (4) and s. 23.
>
> (2) Where the Commissioner decides to grant planning permission in respect of a development he may issue a development order -
>
> (a) granting planning permission without any condition in respect of the development;
>
> (b) granting planning permission subject to such condition or conditions as the Commissioner may think fit in respect of the development:
>
> Provided that the Commissioner shall not issue a development order under this sub-section unless he is satisfied that the provision of s. 41 relating to the assessment of development charges has been complied with.
>
> (3) Without prejudice to the generality of para. (b) of sub-s. (2), the Commissioner may impose any or all of the following conditions:
>
> (a) to the effect that the development order granting planning permission in respect of any change of use of land or building is only for a limited period and after the expiry of that period the use of the land or building

as authorised under such development order shall cease to have any effect and the land or building shall be reverted to its original use; and

(b) to regulate -

(i) the development and use of any other land which is under the control of the applicant and which is adjoining the land for which planning permission is to be granted for the development thereof; and

(ii) the works that may be carried out on such other land in the manner and to the extent as may appear to the Commissioner to be expedient with regard to the development for which planning permission is to be granted.

(4) The Commissioner in dealing with an application for planning permission shall take into consideration such matters as are in his discretion expedient or necessary for purposes of proper planning and in this connection but without prejudice to the discretion of the Commissioner to deal with such application, the Commissioner shall as far as practicable have regard to

(a) the provisions of the development plan and where the local plan has not been adopted, the comprehensive development plan; and

(b) any other material consideration:

Provided that, in the event of there being no local plan for an area and the Commissioner is satisfied that any application for planning permission should not be considered in the interest of proper planning until the local plans for the area have been prepared and adopted under this Act then the Commissioner may either reject or suspend the application.

(5) Upon the receipt of an application for planning permission the Commissioner shall within such time as may be prescribed either grant or refuse the application and when the application is granted subject to condition or refused, the Commissioner shall give his reasons in writing for his decision.

(6) Where a development order is granted, whether with or without conditions, it shall be conveyed to the applicant in the prescribed form.

The section, while conferring a wide discretion upon the appellant in matters of planning in its first sub-section, goes on to impose, in its fourth sub-section, restrictions on the exercise of that discretion. In particular, for present purposes, it requires the appellant to take into account the several matters set out therein when arriving at a decision. It also recognises the importance of a reasoned decision by requring the appellant, in sub-s. (5), to state his reasons when

refusing an application for planning permission or when granting conditional approval.

Statutes that confer discretion upon a public decision-maker have come before the Courts on previous occasions, giving rise to a large body of jurisprudence upon the subject. Hence, the principles that govern a case such as the present are not in doubt. Indeed, Counsel before us stand upon common ground in relation to the principles of law that are well-settled and beyond challenge. The difference between them really lies within the narrow confines of the application of those principles to the particular facts of the present appeal.

In our judgment, the present case falls to be decided by reference to the following proposition of law which we consider to be incontrovertible.

First, a public decision-maker - and the present appellant is such a person - upon whom a power or discretion is vested by Parliament is akin to a trustee. He is under an obligation to exercise it reasonably and in accordance with the terms of the relevant statute that confers the power or discretion. It matters not a jot to the principle that the language employed in the conferment of the power or discretion is of wide amplitude. This much was made clear by the former Federal Court in *Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn. Bhd.* [1979] 1 MLJ 135, considered by all concerned to be the leading case upon the subject. And it is appropriate that we remind ourselves of what fell from the Court on that occasion.

Suffian LP, when dealing with the exercise of a discretion conferred upon the Land Executive Committee said:

> In reconsidering these applications, the Committee should act fairly and not arbitrarily. There must be no bad faith and no dishonesty, though in fairness to everybody concerned nobody has suggested that on the part of the committee. There must be no unreasonableness, no attention to extraneous circumstances, no disregard of public policy, and thing of that sort - things mentioned by Lord Greene MR, at p. 682 in *Associated Provincial Picture House v. Wednesbury Corporation* [1974] 2 All ER 685.

Raja Azlan Shah Ag. CJ (Malaya) explained the principle and its *raison d'etre* in words that are accorded respect that is usually reserved to statutory formulae found in an Act of Parliament:

> On principle and authority, the discretionary power to impose such conditions 'as they think fit' is not an uncontrolled discretion to impose whatever conditions they like. In exercising their discretion, the planning authorities must, to paraphrase the words of Lord Greene MR in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn.* have regard to all relevant considerations and disregard all improper consideration, and they must produce a result which

does not offend against common sense; or to repeat Lord Denning MR's words in *Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government* [1958] 1 All ER 625, approved in *Fawcett Properties Ltd. v. Buckingham County Council* [1960] 3 All ER 503, the conditions to be valid must fairly and reasonably relate to the permitted development. The *dictum* of Lord Denning MR has been frequently quoted and followed in these matters. See *R. v. Hillingdon Council, ex parte Royco Homes Ltd.* [1974] QB 720 Lord Denning said (p. 572):

> The principles to be applied are not, I think, in doubt. Although the planning authorities are given very wide powers to impose 'such conditions as they think fit', nevertheless the law says that those conditions, to be valid, must fairly and reasonably relate to the permitted development. The planning authority are not at liberty to use these powers for an ulterior object, however desirable that object may seem to them to be in the public interest.

Applying the principles stated above, what is the effect of the condition under consideration? I read the affidavit of the Chairman, Land Executive Committee as claiming an unfettered discretion to grant or reject any application under s. 124 or impose such conditions or other requirements as the committee think fit. I cannot subscribe to this proposition for a moment. **Unfettered discretion is a contradiction in terms.** My understanding of the authorities in these cases, and in particular the case *of Pyx Granite (ante)* and its progeny compel me to reject it and to uphold the decision of the learned Judge. It does not seem to be realised that this argument is fallacious. *Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the Courts to intervene. The Courts are the only defence of the liberty of the subject against departmental aggression. In these days when Government departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizen: so that the Courts can see that these great powers and influence are exercised in accordance with law.* I would once again emphasise what has often been said before that 'public bodies must be compelled to observe the law and it is essential that bureaucracy should be kept in its place', (per Danckwerts LJ in *Bradbury v. London Borough of Enfield* [1967] 3 All ER 434, 442. (Emphasis added.)

Second, where the exercise of a discretion is challenged on grounds *of vires* that is illegality, or unreasonableness, the Court is not confined merely to the decision-making process, but may examine the merits of the decision itself. The clouds of uncertainty that had pervaded this area of the law have now been swept away by the landmark decision of the Federal Court in *R.Rama Chandran v. The Industrial Court of Malaysia & Anor.* [1997] 1 CLJ 147; [1997] 1 AMR 433. We have applied it in this Court on several occasions. See, for example, *Majlis Perbandaran Seberang Perai v. Tropiland*

Selangor Bhd. Bhd. [1996] 3 CLJ 837; [1996] 3 MLJ 94. It has very recently been affirmed by another division of the Federal Court in *Kumpulan Perangsang Selangor Bhd. v. Zaid bin Haji Mohd Noh* [1997] 2 CLJ 11; Civil Appeal No. 02-57-93.

Third and lastly, a public decision-maker whose exercise of discretion is questioned must meet the challenge by adducing relevant and admissible evidence. Applications for **certiorari** and the other relief specified in para. 1 of the Schedule to the Courts of Judicature Act 1964 are normally contested on affidavit evidence. As a general rule, where an applicant files an affidavit alleging that a particular decision was not arrived at in accordance with law, e.g., because the decision-maker had taken into account irrelevant matters, it is incumbent upon the particular decision-maker in the usual way to affirm and file an affidavit rebutting the allegation and setting out those matters which led him to make the impugned decision. Of course, procedurally speaking, there is no power in the Court to direct a party to affirm and file an affidavit. Parties to a litigation have conduct of their case and the Court cannot compel either side to file affidavits. See, *Minister of Labour, Malaysia v. Sanjiv Oberoi* [1990] 1 CLJ 44; [1990] 1 MLJ 112

There may, of course, be good reasons for the absence of an affidavit from the particular decision-maker, e.g., because he is dead. Or it may be a case where an affidavit from the decision-maker is unnecessary. Thus, a Chairman of the Industrial Court is not expected to file an affidavit in rebuttal to an application to quash his award.

But, where no cogent reasons are proffered by way of admissible evidence for the absence of such an affidavit the general rule will apply with full force. Consequently, where allegations on affidavit are unrebutted by the party against whom they are made, a Court is entitled to conclude that those allegations have been accepted. See, *R. Rama Chandaran (supra)*, per Edgar Joseph Jr. FCJ, at p. 529.

There is another aspect to this principle. It is that the affidavit in order to amount to a satisfactory rebuttal, must be affirmed by the person who has personate knowledge of the facts in issue. In cases where the exercise of discretion by a public decision-maker is challenged, in the absence of those special circumstances which we referred to a moment ago, the rebuttal must come from the decision-maker himself. An affidavit by a deponent who has no personal knowledge of the considerations upon which the decision was based is pure hearsay and is worthless as evidence and no Court can be expected to pay the slightest attention to it.

Further, subject to certain well-established exceptions to which we will advert in a moment, a public decision-maker must, if he elects to file an affidavit make full and frank disclosure of the basis upon which he arrived at his decision. Cases where such disclosure cannot be required include those involving national security or those falling within the purview of the doctrine of public interest immunity. See, *R. v. Lewes Justices, ex parte Home Secretary* [1973] AC 388.

These principles are, as we earlier observed, well-established. If authority is needed to support them, it is to be found in the following cases.

In *New Zealand Fishing Industry Association Inc. v. Minister of Agriculture and Fisheries* [1988] 1 NZLR 544, Cooke P (now Lord Cooke of Thorndon), when dealing with an application for judicial review said (at p. 553):

> The Court does not have the advantage of an affidavit from the Minister. There is an affidavit by Dr. Allen, sworn on 25 July 1988, which includes some claims as to what was the Minister's view and what he took into account. This kind of opinion or hearsay evidence of what was in the mind of someone else is inadmissible, as pointed out in *Fiordland Venison Ltd. v. Minister of Agriculture and Fisheries* [1978] 2 NZLR 341, 345. The draftsman of the affidavit seems to have ignored or overlooked that judgment, although in its general nature that case bears quite a close resemblance to the present one and concerned the same Government department. The very inclusion of these statements in the affidavit suggests a sense that the Court should be informed of the Minister's thinking. It seems desirable to repeat what was said in *Fiordland Venison* at p. 346:
>
> > ... administrative law is not a formal or technical field, but one in which it is vital for the Court to be as fully informed as reasonably possible of the facts and issues as they presented themselves at the time to the authority whose decision is under review.

At p. 554 of the report, the learned Judge is quoted as saying this:

> One can understand that a Minister may be reluctant to expose himself to cross examination but cross examination is not permitted as of right in judicial review proceedings and in my opinion the Court should not allow a Minister to be cross examined in such proceedings unless this is clearly necessary to enable the case to be disposed of fairly. Compare *Goodman Fielder Ltd. v. Commerce Commission* [1987] 2 NZLR 10, 20. Another course open to the Court is simply to decline to allow a Minister's affidavit to be read if he is not willing to be cross examined. Ultimately, the choice is the Minister's. No one can force him to give evidence. But of course our system of government involves the rule of law. When a Minister's handling of a particular matter has naturally given rise to serious doubts about whether he has had regard to the obligations placed on him by Parliament, refraining from being prepared to justify himself in Court can serve to strengthen misgivings, as well as rendering the Court's task more difficult. As this case should demonstrate yet again, the Courts recognise that they should

not trespass into the legitimate policy sphere of Ministers. The constitutional corollary should be ministerial candour with the Courts about their policy. This does not seem too much to ask.

In *R. v. Barnsley Metropolitan Borough Council, ex parte Hook* [1976] 1 WLR 1052, 1058, Lord Denning said:

> Then Mr. Howard, on behalf of the corporation, said that these two matters (which I have mentioned) - the presence of the market manager and the excessive penalty - were not mentioned in the grounds on which Mr. Hook applied for **certiorari** to the Divisional Court. That is correct. But I think he should still be able to raise them. It must be remembered that, in applications for **certiorari**, the applicant knows very little of what has happened behind the scenes. He only knows that a decision has been taken which is adverse to him, and he complains of it. His statement of grounds (filed under RSC, O. 53 r. 1(2)) should not be treated as rigidly as a pleading in an ordinary civil action. If the Divisional Court give leave (as it did here) the practice is for the respondent to put on affidavits the full facts as known to them. The matter is then considered at large upon the affidavits. If there then appear to be other grounds on which **certiorari** may be granted, the Court can inquire into them without being bound by the grounds stated in the original statement. The Divisional Court will always look into the substance of the matter. So here. On the case as it has developed in this Court it seems to me that the Barnsley Corporation, in all good faith but erroneously, have taken away this man's licence to trade without justification and without having that due inquiry which the law requires.

In *Madhya Pradesh Industries Ltd. v. The Income Tax Officer, Nagpur* AIR [1970] SC 1011, 1015, Hegde J, after discussing the decisions of the Indian Supreme Court in *Naravanappa v.Commissioner of Income Tax, Bangalore* AIR [1967] SC 523 and *Kantamani Venkata Narayana & Sons v. First Additional Income Tax Officer, Rajahmundry* AIR [1967] SC 587 said:

> In these cases, the company in its writ petitions had repudiated the assertion of the Income Tax Officer that he had reason to believe that due to the omission or failure on the part of the company to give material facts, some income had escaped assessment. Under those circumstances one would have expected the officer who issued the notices under s. 34(1)(a), to file an affidavit setting out the circumstances under which he formed the necessary belief. We were told that one Mr. Pandey had issued the notices in question. That officer had not filed any affidavit in these proceedings. The proceedings recorded by him before issuing the notices have not been produced nor his report to the Commissioner or even the Commissioner's sanction has not been produced. Hence it is not possible to hold that the Income Tax Officer had any reason to form the belief in question or the reasons before him were relevant for the purpose. We have no basis before us to hold that the Income Tax Officer had jurisdiction to issue the impugned notices. Hence the proceedings taken by him have to be quashed.

Closer to home, the Federal Court in *R. Rama Chandran (supra)* has expressed similar views. Edgar Joseph Jr. FCJ, who formed the majority, said (at pp. 220-221 (CLJ); at p. 529):

> Now, at an application for judicial review, evidence is normally presented in the form of affidavits I must therefore touch on the appreciation of affidavit evidence in judicial review proceedings.
>
> In England, the Divisional Court labours under no *inherent* disability to resolve disputed facts. The observation that judicial review process is unsuitable for resolving factual disputes ought not, therefore, to be overstated.
>
> In the book entitled '*Judicial Review'* by Michael Supperstone QC, and James Goudie QC, under the topic of 'Evidence' I find the following passage (at p. 378):
>
> > The fact that evidence is given by affidavit does not mean that the Court is unwilling or unable to resolve any disputes of fact that should arise. Where there is a conflict of evidence on the affidavits, but the probabilities can be shown to favour one account over the other, the Court can act on that factual footing.
>
> In this, I think, the authors are correct. I note, for example, in *Chief Constable of North Wales Police v. Evans* [1982] 1 WLR 1155, HL, there was a, "conflict of evidence as to the interview", as to which, on appeal to the House of Lords, Lord Bridge (at 1165 F) preferred Evan's version "on the probabilities." So also, in *Leach v. Deputy Governor of Parkhurst Prison* [1988] AC 533, the ability to resolve factual disputes was a central point of the rejection of *R v. Deputy Governor of Camphill Prison, ex parte King* [1985] QB 735.

Applying the principles we have discussed thus far to the facts of the present appeal, we arrive at the following conclusions.

In the first place, there is no doubt that s. 22 by its terms confers a discretion upon the appellant in matters of planning approval. But it is not an unfettered discretion because Parliament has directed that the appellant should take into account certain considerations before making his decision whether to grant or to refuse approval.

Secondly, we are in agreement with Dato' Zaki's submission that the question whether planning approval should be granted or refused is a matter for the appellant to decide. He has access to material and information which is, for good reason, denied this Court. We therefore agree that it is not the function of the Court to determine how the planning of Kuala Lumpur should take place.

Thirdly, since it is for the appellant to make the determination on issues of planning approval, it is for him, when challenged, to set out the matters he took into account when arriving at his decision so as to satisfy the Court that

he acted in accordance with law. This he must do, in the ordinary way, by filing an affidavit explaining the circumstances that affected his decision. On the authorities, he cannot be compelled to provide an affidavit. But if he does not do so, the usual consequences, to which we have earlier adverted, must follow and the Court must be left to decide the case on such admissible evidence as is made available to it.

Here the appellant has not filed any affidavit. Nor has any, or any sufficient, reason been advanced in the affidavits to justify this failure. We may add that this case does not fall within any of the exceptions earlier discussed. There is also no valid reason not to place the facts before the learned Judge. There is no suggestion that questions of national security or public interest immunity are involved. They are not.

All that the learned Judge had before him was an affidavit deposed to by one Mokhtar bin Long Idris, affirmed on 4 March 1994. He is the person who conducted the inquiry attended by the respondent's solicitor. In this affidavit, the deponent purports to set out the reasons why Tradium received planning approval. But it is the appellant's case that the decision to grant Tradium planning approval was made by none other than the appellant himself. In these circumstances, all that Mokhtar bin Long Idris had to say about the matter was pure hearsay.

The point was taken before the learned Judge and finds mention in his judgment. Unbortunately, he did not deal with it. But it remains a live issue and has been properly re-agitated before us. We are therefore entitled to deal with it.

The upshot is that there is absolutely no admissible evidence in the record provided to us on the critical issue in this case, namely, whether the discretion was exercised in accordance with law. The respondent must, therefore be held to have established his case.

Dato' Zaki's submission that it is open to this Court, on the material made available, to hold that discretion has been properly exercised in this case, while attractive at first blush contains a fallacy. It is this.

The material referred to and relied upon by him is contained in an affidavit which is hearsay and therefore inadmissible. So one returns to the point where one began. The Court can hold an administrative action to be reasonable provided there is admissible evidence to support such a conclusion. There is simply no such evidence in the present case and we are accordingly precluded from entering upon that course of inquiry.

Having read the record of appeal with care and having given the submissions of Counsel our most anxious consideration, we are compelled to conclude that this appeal is without merit and must fail.

We wish to say a few words on the question of costs. This is a case where the appellant has established that the learned Judge was wrong in his reasons for issuing **certiorari**. The respondent therefore succeeded before the learned Judge for the wrong reason. Before us he succeeds on other grounds. Taking into account these and all other circumstances, we think that this is a proper case in which there should be no order as to costs here as well as in the Court below.

For the foregoing reasons, the appeal is dismissed. All orders made, by the learned Judge, save the order as to costs, are affirmed. Each party shall bear his own costs here and in the Court below. The deposit, if any, paid into Court by the appellant shall be refunded to him.

Reported by WA Sharif